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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS OF THE COURT BELOW.

There are two opinions of the Minnesota Supreme Court in this case, not yet officially reported. The first, filed on June 27, 1930, is reproduced at R. 464-473. It stated the Court's reasons for affirming the verdict for respondent, on condition of a reduction of damages from $27,500 to $22,500. The second opinion of the Court, filed on August 8, 1930, and reproduced at R. 488, affirmed the judgment entered for the reduced amount, and referred to the former opinion for the Court's reasons for so doing.

JURISDICTION.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on August 19, 1930 (R. 490).

The jurisdiction of this Court is invoked on the basis of the following specific claims advanced and rulings made in the lower courts:

Petitioner moved the District Court to set aside the verdict because it was "deprived of a fair trial" by misconduct of respondent's counsel in making to the jury appeals to passion and prejudice (R. 446, 456-462). The Court entered an order denying that motion (R. 462). Petitioner appealed to the Supreme Court of Minnesota which declared that "little justification" could be made of parts of the argument of respondent's counsel to the jury; held the verdict excessive "because of passion and prejudice"; and affirmed it upon condition that respondent consent to its reduction from $27,500 to $22,500 (R. 471-473). Respondent having so consented, judgment was entered in the District Court on the verdict so reduced (R. 475, 477). Petitioner appealed to the Minnesota Supreme Court from that judgment, assigning error in the Court's refusal to set aside the verdict because of misconduct of respondent's counsel in making "prejudicial, inflammatory and unwarranted" statements to the jury which "deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 478, 479, 481). That judgment was affirmed by the final judgment of the Supreme Court here to be reviewed (R. 488).

The statutory provision under which the jurisdiction of this Court is invoked is Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937).

Cases believed to sustain the jurisdiction are:

Ark. Cattle Co. vs. Mann, 130 U. S. 69.

Seaboard Air Line vs. Horton, 233 U. S. 492.

Atlantic Coast Line R. R. vs. Burnette, 239 U. S. 199.

C. M. & St. P. Ry. Co. vs. Coogan, 271 U. S. 472.

Atlantic Coast Line R. R. Co. vs. Davis, 279 U. S. 34.

Atlantic Coast Line R. R. Co. vs. Driggers, 279 U. S. 787.

St. L. & I. M. Ry. Co. vs. Taylor, 210 U. S. 281.

Jordan vs. Mass, 225 U. S. 167, 176.

STATEMENT OF THE CASE.

Respondent sued petitioner under the Federal Employers' Liability Act (35 Stat. 65) in the District Court of Minnesota, Crow Wing County, to recover damages for injuries sustained by respondent, on February 27, 1928, at Cloverton, Minnesota, while employed by petitioner as a brakeman in interstate commerce.

Respondent sustained his injuries in falling from the top of a box car, when it was derailed in the snow, as it was pushed by a locomotive along a house track, preparatory to a "flanging" movement of the locomotive to clear the snow from the track (R. 23-26, 154).

Petitioner's liability for the accident was predicated on the alleged existence of ice on the rails under the snow (R. 2, 9, 10). There was a sharp conflict in the evidence as to the existence of ice causing the accident (R. 11, 28, 29, 32, 80, 225, 241, 246, 441, 442, 86, 87, 96, 97, 101, 107, 109, 114, 115, 209, 211). Thus there was a fundamental question of fact for the jury on which petitioner's liability depended, as well as other questions of fact which need not be specified.

After the close of the evidence respondent's counsel made

a highly inflammatory speech to the jury, replete with improper appeals to passion and prejudice, of which the following may be mentioned.

Counsel represented railroad companies in general as trying to fasten on an injured man fighting for his rights in court the stigma "that he was a perjurer and a liar" (R. 392). He spoke of "the difficulties of a man, single-handed, fighting a powerful corporation"; the "feeling of superiority * * * of men who represent corporations"; and the handicaps of a man fighting in behalf of "what they call the under dog" (R. 403). He described respondent as "giving to this mighty railroad eighteen of the best years of his life" and characterized petitioner as "coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud" when it "in common decency and common honesty, if they possess it, should pay this man" (R. 404).

He described petitioner's counsel as a "cool, calculating" corporation lawyer (R. 397). He stated that in a wide experience he had "never seen as ingenious and dishonest a defense as is put up in this case" (R. 404). He insinuated that *one* of petitioner's witnesses did not lie for the reason that petitioner's counsel had not had time to "prepare" that witness for his testimony (R. 395).

He suggested that a small verdict would "leave this man a pauper and a begger to go upon the streets" (R. 411). He pictured respondent as "dragging himself up to the doors of the factories and the work shops of America" in an unsuccessful search for work (R. 408). He asserted that if the jury returned a verdict for $26,000, petitioner's counsel would gleefully telegraph the news to headquarters (R. 405).

After the jury had returned a verdict for $27,500 in favor

of respondent, petitioner on motion for a new trial and successive appeals to the Supreme Court of Minnesota duly contended for a new trial on the ground that it had been deprived of a fair trial through passion and prejudice injected into the verdict by respondent's counsel. See above under "Jurisdiction." As there explained, the Supreme Court of Minnesota required petitioner to submit to a judgment of $22,500 based on the jury's verdict, although it criticised the speech in which counsel had appealed to passion and prejudice, and expressly found that the verdict had been rendered under the influence of such hostile emotions (R. 473).

ASSIGNED ERROR INTENDED TO BE URGED.

The error intended to be urged was thus assigned in the Supreme Court of Minnesota:

> "The court erred in refusing to set aside the verdict and grant defendant a new trial on the ground of misconduct of plaintiff's counsel in making highly prejudicial, inflammatory and unwarranted statements to the jury in his closing argument, which conduct deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 481, 482).

It was thus assigned in the petition for certiorari (p. 4):

> "Allowing judgment to be entered on a verdict corrupted by passion and prejudice was contrary to the principle that judgment may not be based on a verdict thus tainted."

ARGUMENT.

The Principle Here Contended For.

Petitioner contends that, although a "remittitur" affirming a verdict upon condition of a reduction in its amount may be recognized as proper where nothing but the amount is subject to criticism, that is not a proper remedy and a new trial must be ordered if it is established that the verdict was actually rendered under the influence of passion and prejudice deliberately injected by counsel improperly appealing to such influences.

The possible qualification of that principle as not obtaining where the evidence is such that a verdict must be directed in favor of the party who obtained it, is wholly inapplicable here because the evidence as to the facts on which petitioner's liability was asserted made a question for the jury as to their existence, and the Court did not hold that the evidence required a verdict for respondent.

Mr. Justice Stone vigorously dissented from the decision merely to order a remittitur, on the ground that the entire verdict should be set aside. He said:

> "We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small portion of the relief such a *combination* normally demands" (R. 473). (Italics ours.)

Previous Recognition of This Principle in Minnesota.

Mr. Justice Stone was obviously referring to the Court's previous recognition in *Hanskett vs. Broughton*, 157 Minn. 83, of the principle for which we contend. There the Court

ordered a new trial because the verdict was obtained by appeals of counsel (not formally objected to at the time) to the passion and prejudice of the jury. It explained that the order for a new trial was (p. 88)

> "predicated solely upon our conclusion that the verdict seemed excessive and that its size may have been due to misconduct of counsel,"

and that

> "Its seemingly excessive character, coupled with the conduct of counsel, made a *combination* which required a new trial, as the opinion states, in the interest of the proper administration of justice." (Italics ours.)

That decision was in accord with the same Court's previous recognition of the same principle in *Petruschke vs. Kamerer,* 131 Minn. 320. There the Court ordered a new trial because of an excessive verdict rendered under the influence of passion and prejudice instilled by counsel in his address to the jury, saying (pp. 324-327):

> "One ground assigned for a new trial in the Court below was excessive damages given under the influence of passion and prejudice. The same ground is assigned here. We take it that under this assignment the whole record may be examined for matters inducing passion and prejudice affecting the size of the verdict, even though such matters crept in at times when appellant's counsel failed to object. * * * It is impossible to read this record without coming to the conclusion that there was instilled into the minds of the jury an undue amount of passion and prejudice. * * * Fair trial, without passion and without prejudice, * * * is due every litigant, sinner as well as saint, in a court of justice. * * * We conclude that the exception to an

excessive verdict, rendered by the jury under the influence of passion and prejudice, must be sustained; and a new trial should be had."

Incidentally, the Court in that case clearly recognized the important distinction between misconduct of counsel *per se* and such misconduct as actually reflected in an improper verdict. There a new trial was applied for (131 Minn. 323) because of "misconduct of plaintiff's counsel in his argument to the jury" and because the verdict was "excessive and appears to have been given under the influence of passion and prejudice." Referring to the first of those grounds, misconduct *per se*, the Court noted that the trial court had not been asked to interfere, and expressly declined (p. 323) to order a new trial on that ground. It proceeded, however, as noted above, to order a new trial because of the misconduct as actually reflected in an improper verdict.

The same Court in *Morner vs. Kohen*, 172 Minn. 543, 547, ordered a new trial and reversed an order which merely reduced the damages, saying:

"The conduct of plaintiff's attorney tended to incite prejudice, and the grossly excessive verdict indicates that the jury must have been influenced by prejudice. And the prejudice reflected in the verdict may have affected the determination of the other issues presented. At least we are unable to say it did not."

The same Court declared in *Arrell vs. Davies*, 171 Minn. 472, 474, that:

"It has been held that when a verdict is excessive and it is probable that the jury were influenced by passion and prejudice in the determination of other issues, a new trial should be granted; but, where the only complaint is that the verdict is excessive, it is within the

discretion of the trial court to deny a new trial on condition that the prevailing party submit to a reduction."

Thus the principle we contend for was well established in previous Minnesota practice unaccountably departed from in the present instance.

RECOGNITION OF THIS PRINCIPLE IN OTHER STATES.

The Supreme Court of Michigan in ordering a new trial for appeals of counsel to passion and prejudice in *Cluett vs. Rosenthal,* 100 Mich. 193, 200, declared:

> "* * * where the language is such as evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, we cannot overlook it, or consider that a party against whom such effort has been made has had a fair consideration of his case at the hands of the jury."

In *Appel vs. Chicago City Ry. Co.,* 259 Ill. 561, the Court declared:

> "misconduct of counsel not objected to cannot be made the ground of reversal. * * * The question still remains whether the defeated party, in view of the whole record, has had a fair trial. * * * If the argument prejudiced the jury against the defendant, that prejudice was as likely to affect their judgment in regard to the defendant's liability as in regard to the amount of the liability."

In *Houston & T. C. R. Co. vs. Rehm,* 36 Tex. Civ. App. 553, the Court ordered a new trial because of appeals by plaintiff's counsel to the passion and prejudice of the jury, not objected to at the time, saying:

"We think it well settled that when counsel in their address to the jury intentionally go outside of the record and indulge in remarks that are clearly prejudicial to the rights of the opposing side, and must have been made for the purpose of influencing the jury, such conduct not only authorizes, but requires, the trial court to set aside the verdict of the jury, notwithstanding the remarks were not objected to at the time they were made. * * *

"The prejudicial effect of these remarks is reflected in the size of the verdict rendered, which we think is much larger than the facts warrant. If this were the only effect produced by the violation by appellee's counsel of the rule requiring the argument to be confined to the evidence, we might remedy the wrong by requiring a remittitur, but, as before stated, the evidence is not conclusive upon either the issue of negligence on the part of appellant nor that of contributory negligence, and we cannot say that these improper remarks did not influence the jury in the determination of these issues."

In *Wabash R. R. Co. vs. Mahoney*, 79 Ill. App. 53, 58, the Court said:

"If the court was of the opinion, as it stated at the hearing on the motion for a new trial that for the alleged improper remarks of plaintiff's counsel to the jury said verdict should be reduced $400, then a new trial should have been granted, for it seems impossible that the learned trial judge could have determined to what extent the verdict was induced by counsel's remarks."

RECOGNITION OF THIS PRINCIPLE IN FEDERAL COURTS.

In *Arkansas Cattle Co. vs. Mann*, 130 U. S. 69, 75, this Court quoted with approval the following statement from *Stafford vs. Pawtucket Haircloth Co.*, 2 Cliff. 82:

> "where the circumstances clearly indicate that the jury were influenced by prejudice * * * that remedy (remission of part of the damages) cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding."

Again in *Gila Valley Ry. vs. Hall*, 232 U. S. 94, 104, 105, this Court approved the lower court's adoption of the rule thus stated:

> "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case."

The underlying reason for the rule was thus explained in *Preston vs. Mutual Life Ins. Co.*, 71 Fed. 467:

> "it is plain and unquestionable that a verdict in favor of a party whose conduct was calculated to improperly influence the jury upon a material question should be set aside, and a new trial granted, on the ground of public policy. * * * The duty of the court to see that a trial is fair, and that all material questions are fairly presented, is imperative, and the duty to regulate the proper conduct of a trial may be discharged either with or without motion."

Constitutional Requirements That This Principle Be Recognized.

The Minnesota Supreme Court explained in *Smith vs. Great Northern Ry. Co.*, 133 Minn. 192, that in such cases

> "A new trial is not granted because it discourages misconduct. It is granted because the conduct of counsel interferes with the administration of justice to the substantial prejudice of the rights of a litigant."

That constitutional provisions safeguarding "trial by jury" are thus drawn in question was indicated in *Lomen vs. Minneapolis Gaslight Co.*, 65 Minn. 196, per Mitchell, J., as follows (p. 209):

> "The expression 'trial by jury' is as old as Magna Charta and has obtained a definite historical meaning which is well understood by all English speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are and always have been number, *impartiality* and unanimity." (Italics ours.)

In the same case Canty, J., declared (p. 219):

> "It is conceded by all parties to this case that impartiality is one of the constitutional requirements of a legal jury."

The Federal Constitution contains a provision in Article XIV "nor shall any State deprive any person of life, liberty, or property, without due process of law" and a similar provision in Article V applicable to the Federal Government.

In *ex parte Nelson*, 251 Mo. 63, the Supreme Court of Missouri declared that

"These constitutional provisions are but different modes of expressing the fundamental right of man to a fair and impartial trial, be he innocent or guilty."

This Court declared in *Jordan vs. Massachusetts*, 225 U. S. 167, 176, that

"Due process implies a tribunal both impartial and mentally competent to afford a hearing."

See also *Moore vs. Dempsey*, 261 U. S. 86.
Frank vs. Mangum, 237 U. S. 309.

That there was no impartial trial in the present case is established by the express finding of the Minnesota Supreme Court that the jury acted under the influence of passion and prejudice (R. 473).

Public Policy Requires That This Principle Be Uniformly Enforced in Cases Under This Act.

How would the public interest be affected by a decision of this Court that a State Court is free to decide for itself, in cases under this Act, whether to follow the established practice of setting aside a verdict obtained by appeals to passion and prejudice?

Departures from the established practice of setting aside verdicts so obtained will, if permitted, be a further inducement to personal injury attorneys who rely on obtaining verdicts in that manner, to import cases under this Act into a jurisdiction where such verdicts are allowed to stand.

The obvious truth of that assertion is not affected by the circumstance that the present case was not an imported one. A decision recognizing authority in the State Court to depart from the established practice in the present instance would necessarily mean that it may likewise depart

from that practice in all cases under this Act, wherever they come from.

If it is also a fact established by previous judicial opinions that the manipulating of such importations now constitutes a well defined abuse of the legal profession, definitely characterized by improper and illegal practices demoralizing to the administration of justice, it necessarily follows that a decision in this case tending to the further development of that abuse would be against the public interest.

It thus becomes important to consider in some detail the authorities showing how such importations are conducted.

The wholesale importation of such suits from state to state constitutes a gross perversion of the purpose of the 1910 amendment to the Act, which permits suits under it to be tried in any state where the defendant does business. 36 Stat. 291.

The purpose of that amendment was, according to the Senate Judiciary Committee, to do away with the disadvantage to the plaintiff of being required (*Macon Grocery Co. vs. A. C. L. Ry.*, 215 U. S. 501, 509) to sue the defendant corporation in the jurisdiction where its charter was issued. The committee declared (Senate Report No. 432, in Vol. 2, Serial No. 5583, 61st Congress, 2d Session):

> "This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.' This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This may be at a place in a distant state from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned. The extreme difficulty, if not impossibility, of a poor

> man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances."

The amendment, thus recommended in order to enable plaintiffs to have their cases tried *in* the jurisdictions where they reside or were injured, has been flagrantly perverted by lawyers specializing in such cases to the precisely *opposite* purpose of trying them in jurisdictions far *removed* from the place of plaintiff's residence or injury.

The astonishing extent of that abuse as practiced in Minnesota was noticed in *Davis vs. Farmers' Co-operative Co.*, 262 U. S. 312, 316, where the Court referred to the fact that

> "a recent examination of the calendars of the District Courts in sixty-seven of the eighty-seven counties of the state disclosed that in those counties there were then pending 1,028 personal injury cases in which nonresident plaintiffs seek damages aggregating nearly $26,000,000 from foreign railroad corporations which do not operate any line within Minnesota."

The heavy expense and disruption of service thus created for the railroads was emphasized by the Court in these words:

> "that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge" (p. 315).

The Court sustained as reasonable, in *Alabama, etc., Ry. Co. vs. Journey*, 257 U. S. 111, an order of the Director Gen-

eral requiring such suits to be brought in the county or district where the cause of action arose or plaintiff resided, which order was based on these significant recitals (257 U. S. 113):

> "it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains * * * are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice * * * seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs."

Of those recitals the Court said in the Davis case (262 U. S. 312, 316):

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

One way in which the public interest is affected was thus explained in the Davis case (262 U. S. 317):

> "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use. Avoidance of waste, in interstate transporta-

tion, as well as maintenance of service, has become a direct concern of the public."

The decision in that case put an end to the importation into a particular jurisdiction of cases against railroad companies which do not operate, but only maintain soliciting agents, in that jurisdiction. It did not, however, terminate the importation of cases against railroad companies actually operating in the jurisdiction to which the cases are imported.

Such importations are as much opposed to the public interest as those stopped by the Davis case. For example, *Weinard vs. C. M. & St. P. Ry. Co.*, 298 Fed. 977, was sued in the U. S. District Court for Minnesota in behalf of an employe injured in the railroad company's shops at Tacoma, Washington, where he resided. That railroad operates in Minnesota as well as Washington. The Court declared:

"The proofs submitted by the defendant show that it would be required to bring a large number of witnesses to Minneapolis from Tacoma, involving a round trip of 3,574 miles, at great expense, depleting, to the extent of the number of witnesses so taken from their work, the shop force of the defendant at Tacoma, and would increase very materially the expense of the trial over what would be incurred if the case were tried where it arose, at Tacoma, Washington. * * *

"The showing is also made that * * * personal injury cases against interstate carriers are brought by hundreds from great distances and from all parts of the United States, and commenced in the courts of Minnesota, and that the combined and cumulative effect of that practice * * * is to underman the shop forces and train crews of interstate railroads, and to enormous-

ly increase the operating expenses of such interstate carriers, which expense must be met by increased rates on interstate traffic, and which, in turn, affects the general public making use of the facilities of such carriers."

The opinion even disclosed that:

"train movements have had to be cancelled and annulled on account of the absence of the necessary employes to operate the same while said witnesses were away from their homes attending trials in the State of Minnesota."

The enormous scope of the abuse was indicated by showing that in a period of four years there were imported into Minnesota against the C. M. & St. P. R. R. Co. *alone* 224 personal injury suits claiming $9,000,000 damages for plaintiffs injured and residing in Washington, Idaho, Montana, North Dakota, South Dakota, Wisconsin, Illinois, Michigan, Indiana and Iowa. (298 Fed. 982.)

The right of a State to decline to entertain such cases, against a railroad doing business in the State because of plaintiff's residence in another jurisdiction was recognized in *Douglas vs. New York, New Haven and Hartford R. Co.*, 279 U. S. 377. There the Supreme Court of New York sustained a dismissal of a suit under this Act by a plaintiff injured and residing in Connecticut against a railroad doing business in New York State. A New York Statute was construed as authorizing the Court to entertain or dismiss at its option such a suit brought by a non-resident plaintiff. This Court held that such a dismissal on the basis of residence did not infringe the provision in the Federal Constitution against discrimination by State Courts on the basis of citizenship; also that the Federal Employers' Liability Act (p. 387)

"does not purport to require State courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned."

However, a majority of the Supreme Court of Minnesota holds that the above case is not adequate authority for the Minnesota courts to decline to try imported cases under this Act. It declared in *Boright vs. C. R. I. & P. R. Co.*, 180 Minn. 52 (with a sound dissenting opinion by Mr. Justice Stone), that (p. 60)

"to refuse jurisdiction, the Constitution aside, would result in a complete change of the local (Minnesota) law—a change which we do not wish to make."

The securing and trying of such cases is chiefly concentrated in the hands of a small class of personal injury attorneys who have developed into a highly specialized offshoot of the legal profession, with headquarters at Minneapolis, definitely characterized by certain notorious practices in flagrant violation of respectable professional opinion, judicial pronouncements, common law prohibitions, and statutory enactments directed against them.

One of their practices consists in violating the laws and mandates of other States against importuning persons who reside, were injured and could sue the defendant in those States, to authorize the bringing of suits in their names elsewhere.

C. B. & Q. R. Co. vs. Tom Davis, et al., 111 Neb. 737, was a suit to enjoin those attorneys from violating the Nebraska Statute, Sec. 9737, Comp. St. 1922, providing a fine or jail sentence for contravention of its provision against soliciting cases in that State to be sued in other States, reading as follows (p. 740):

"That it shall be unlawful for any person, with the intent or for the purpose of instituting a suit thereon outside of this state, to seek or solicit the business of collecting any claim for damages for personal injury sustained within this state, or for death resulting therefrom, or in any way to promote the prosecution of a suit brought outside of this state for such damages, or do any act or thing in furtherance thereof, in cases where such right of action rests in a resident of this state, or his legal representative, and is against a person, copartnership or corporation subject to personal service within this state."

One of the contentions urged by those attorneys was that the remedy for violation of the statute should be by criminal prosecution, not by injunction; but the Nebraska Supreme Court held that the injunction issued by the Court below restraining them from further violating the Statute, was a proper remedy. It explained that the Statute did not attempt to abridge the right of an injured person to bring an action in any jurisdiction he might choose, and that it was solely directed against the personal injury attorneys, saying (p. 741):

"It was a matter of common knowledge that a few attorneys outside of the state, through themselves and agents, were engaged in the practice of soliciting claims for settlement or suit in personal injury actions, and also in cases where the injury resulted in death, with the avowed purpose of bringing actions thereon in some foreign jurisdiction, notwithstanding the fact that both of the parties to the controversy resided in the state. A condition existed where agents of these attorneys were traveling in the state soliciting employment for

non-resident attorneys, haunting the homes of the injured and bringing great discredit to the legitimate practice of the law. It was to curtail this species of 'ambulance chasing' which prompted the Legislature to enact the statute in question. * * * The act was intended as a regulatory measure to curtail the conduct of a class of attorneys who were guilty of infractions of long-established ethical precepts of the profession."

Moad vs. Illinois Central R. R. Co., was an action brought by those same attorneys in the Minnesota District Court, Tenth Judicial District, on account of injuries sustained by plaintiff in Iowa, while an employe of the railroad company. They petitioned the District Court to allow an attorney's lien for services rendered to plaintiff in that action. The Court made Findings of Fact, dated June 26, 1923, on file in the office of the Clerk of that Court at Albert Lea, Minnesota.

The Court found that plaintiff resided, was injured and was being cared for at the Company's expense in a hospital, in Iowa. That he was called upon in the hospital by a regular soliciting agent of those attorneys, for the purpose of inducing him to place his case in their hands to bring suit in Minnesota. That he then declined, stating that he wished first to attempt a direct settlement with the railroad company. That the above and another regular soliciting agent of those attorneys repeatedly thereafter called upon him in the hospital and persistently importuned him to do as requested, representing that those attorneys would pay all of his expenses, railroad fare, hotel bills, and doctor bills, to and at Minneapolis, and all the expenses of the litigation. That he finally yielded to those importunities, was met by said Davis at the train at Minneapolis, was assured by him

that the agreement made by the soliciting agents would be carried out, was lodged at the attorneys' expense at a hotel in Minneapolis, and executed with them a contract that they should prosecute his claim and receive one-third of the net proceeds.

The Court denied the attorneys' application for a lien, declaring that

> "The aforesaid solicitation of said business was and is contrary to the laws of the State of Iowa and contrary to the laws of the State of Minnesota,"

and that

> "to support and sanction such transactions would be a reproach to the legal profession and the courts of this state."

C. M. & St. P. R. Co. vs. McGinley, 175 Wis. 565, was a case in which those same attorneys appeared in opposition to an injunction, which the lower Wisconsin court granted, restraining McGinley from suing the railway company in the State of Minnesota on account of an injury sustained by him as its employe in Wisconsin where he resided. One of the grounds on which the injunction was sought was that the attorneys were guilty of procuring control of the case by improper methods and that it was (p. 579).

> "not being prosecuted in Minnesota in good faith but from ulterior motives, primarily designed to promote the business of such counsel engaged in such reprehensible practice."

In dismissing the injunction, as being beyond the power of the Wisconsin court, the Supreme Court of that State made the following comments on the practices referred to (579):

> "That such practices have been indulged in extensively by counsel, both in the state of Wisconsin and in

the state of Minnesota, is a matter well known to the profession and to the courts. We are also aware that in both states these practices have been emphatically denounced by the state and local bar associations. It is a practice that tends to lower the ethical standard of the profession of the law and has contributed in a large measure to the disrespect which exists among the public with respect to the profession. The practice of the law is an ancient and honored profession, and we number among its followers at all times some of the ablest, most distinguished, and honored citizens of our country. This offensive solicitation of legal business has a tendency to commercialize the business of the profession, to degrade it, and to lower its standard. The practice of it is in violation of the oath that every attorney is required to take, and no reputable attorney in this state or elsewhere will resort to it."

C. M. St. P. & P. R. Co. vs. Wolfe and Hoch, 199 Wis. 278, involved another firm of Minneapolis personal injury lawyers. There an injunction had been issued by the lower Wisconsin court to restrain the prosecution of actions in Minnesota by Wolfe and Hoch who were residents of Wisconsin. It was alleged that Hoch was a locomotive fireman residing in Milwaukee, Wisconsin, where the accident occurred and all the witnesses resided; and similar allegations were made concerning the case of Wolfe. Here again, the Supreme Court of Wisconsin held that the injunction could not properly be issued but declared that the (p. 290)

"temptation to exercise all the powers possessed by this court to cure or alleviate a situation such as is disclosed by the evidence in these cases is very great."

The court pointed out that one of the attorneys who per-

sonally testified, apparently (p. 286)

> "feels safe not only in violating the laws of a sister State and the canons of professional ethics, but in flaunting the violation in the face of his accusers as if to say, 'Here it is, what are you going to do about it?' "

The Court further specified (p. 286) that the attorneys were guilty of the offense of barratry as defined by the laws of Wisconsin. Wisconsin Statutes, 1929, 348.325 provides penalties of fine and imprisonment for common barratry, which it defines as "the practice of soliciting, maintaining or exciting judicial proceedings."

Champerty is another regular feature of procuring these cases for importation into Minnesota. *Winders vs. Illinois Central R. R. Co.*, 177 Minn. 1, was a case procured by the last mentioned Minneapolis personal injury attorneys and sued in Minnesota under the Federal Employers' Liability Act to recover for personal injuries sustained by plaintiff while working on one of defendant's trains in the State of Kentucky where he resided. The Supreme Court of Minnesota held that the Court below properly denied a motion to dismiss on the ground that these attorneys were engaged in the practice of improperly importing such cases with the expectation (p. 4)

> "that the railroads will rather submit to unjust exactions than incur the inconvenience and expense of a trial at a point hundreds or thousands of miles away from where the witnesses reside."

After pointing out that the attorneys loaned plaintiff $500 the Supreme Court declared that (p. 5)

> "The trial court rightly refused to dismiss the action even though convinced that plaintiff had retained his attorneys under a champertous agreement, or that they

are, by illegal methods, obtaining cases for prosecution in this state which in fairness ought to be tried elsewhere."

In concurring with that conclusion Mr. Justice Stone made the following significant statements concerning the methods employed by such attorneys *as a class* (p. 6):

"The courts of Minnesota are trying every year a mysteriously large number of foreign personal injury cases. * * * Thus far, most of such cases have been against railroads, but there has been some evidence of late that foreign automobile personal injury cases are beginning to come. It would be surprising if they did not under present conditions. * * *

"* * * imported cases present features which put them in a class by themselves. It costs money to get them. Competition is keen. * * * It is a common practice for the attorneys procuring a case to finance their client to a greater or less degree pending the litigation. In this case the inference is quite clear that an initial advance of $500 to plaintiff by his attorneys had a very persuasive effect in procuring the contract with him. Such practices result in a very substantial cash investment in the case by the attorneys. That element, necessarily present, possibly explains why many of these imported cases are 'made' by perjury. * * * Neither the vice nor the virtue of them is a monopoly of either side. The point is that the expense of getting the case and holding it results in an unusual temptation to repair its weak points by spurious evidence.

"Furthermore, that these cases, whatever their merits, evidence the existence of open and habitual champerty on a large scale is of course self-evident. The cases are

brought here by unprofessional conduct and practices which are fast making the legal profession and the courts the subject of widespread criticism. * * * It is the too frequent resort to perjury and the dulling effect upon moral sensibilities of familiarity with it which is more to be dreaded than anything else. Nothing need be said to emphasize the vicious character and degrading tendency of the practice of organized and habitual solicitation of any kind of business by attorneys through paid employes. It is especially dangerous to the profession when the potency of the solicitation is enhanced by the promise of whatever financial aid may be needed by the client pending the litigation."

The money advancements commonly made by such attorneys to the owners of causes of action procured for importation do not differ materially from the purchasing of shares in litigation condemned under the name of champerty. The Supreme Court of Wisconsin so held in *C. M. & St. P. R. Co. vs. Wolfe, supra.* It pointed out that the attorneys had advanced to one of the injured men, Hoch, $1,000 on his demand note, plus certain expenses, and had loaned to Wolfe, the other injured man, $1,010 and certain expenses, upon the understanding that those amounts were to be deducted from any recovery obtained, in addition to the attorneys' one-third of the net. The court then declared that (p. 286)

"Advancing funds to clients in consideration of retainer does not differ materially from a purchase of an interest in the claim and the maintenance of a suit thereon for the joint benefit of the purchaser and the client."

Some idea of the large aggregate investments made by the

attorneys in such causes of action may be gained from the Court's summary of the testimony in that case to the effect (p. 285)

> "that none of the expenses of the investigators are charged to clients but are paid by the firm; that the firm maintains a slush fund and entertainment fund; that the investigators were paid about $300 a month; * * * The firm also maintains a corps of expert witnesses; the firm annually loans to clients $50,000; annually pays to Harrigan, chief of the soliciting force, $10,000; pays to investigators annually a total of $18,000, and has other annual expenses of $40,000."

The vicious tendency of such investments by personal injury attorneys in causes of action was thus described by the Court (p. 289):

> "That an organization * * * maintaining a corps of expert witnesses, employing high-powered solicitors, using slush and entertainment funds to secure business and no doubt for other purposes, is a menace to the proper administration of justice cannot be doubted. Having secured business at a large expense, advanced funds to clients, the interest of the members is not as officers of the court in seeing that justice is fairly administered, but that a verdict is secured in each case which will protect their investment and secure to them the fruits of their illicit enterprises."

The above opinions of the Courts speak for themselves. They definitely establish the notorious fact that cases for importation under this Act are procured, fomented and tried in contemptuous defiance of law and proper legal practices. The illicit investments which they embody lead naturally to

illicit methods of recovery. Witness the method of obtaining a recovery in the present case: open and flagrant appeals to passion and prejudice in order to induce the jurors to violate their oath "to impartially try" the case. General Statutes, Minnesota, 1923, Sec. 6965 (3).

A reading of counsel's so-called "argument" to the jury (R. 383-413) discloses an unmistakable purpose to *prevent* the jurors from giving impartial consideration to the questions on which petitioner's liability depended; to substitute in their minds, in place of an impartial attitude, hatred of the petitioner because of the mere fact that it was a powerful railroad corporation opposing the claim of an injured employe; to augment such hatred by insinuating personal attacks on petitioner's counsel as displaying a hard and arrogant attitude towards respondent, as attempting to stamp respondent as a cheat and a fraud, as concocting perjured testimony, as being ingeniously dishonest, as lacking common decency, and as being delighted with anything less than a large verdict, adroitly implying that the jurors would be the dupes of crafty lawyers if they failed to return a large verdict for respondent; all accentuated by dramatic appeals for sympathy for respondent as in danger of becoming a pitiful cripple vainly searching for work; and all without the slightest basis of evidence or justification of any kind.

Since the unscrupulous use of such demagogic methods in personal injury cases makes it easy to obtain verdicts, to share which is the actuating motive and culmination of all the improper practices condemned by the Courts in the foregoing opinions, a decision that a verdict so obtained may not be enforced would promote the public interest by making *all* the practices so condemned less prevalent, through reducing the prospect of their yielding financial returns to the attorneys who indulge in them.

CONCLUSION.

The Court below should be instructed to set aside the verdict and order a new trial.

Respectfully submitted,

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